

DISTRICT OF MAINE

Docket No. 93-271-P-C

rendered its decision, Young Bros. asserted a claim for attorney fees and costs against Vernay Products. Post-Trial Memorandum of Defendant Young Brothers Incorporated (Docket No. 54) at 23-26. In a footnote to its Decision and Order, in which it found in favor of Young Bros. on the plaintiff's strict liability claim and against Vernay Products on all of the plaintiff's claims, the court noted: "The Court has considered Defendant Young Brothers' request for reimbursement of its attorney fees and costs. The Court, finding these fees and expenses to be ordinary and necessary costs of litigation, denies Young Brothers' request." Decision and Order (Docket No. 62) at 31 n.19. An Amended Judgment was entered July 28, 1995 recording judgment for Young Bros. on the cross-claim of Vernay Products. Docket No. 64. Because the court entered judgment in favor of Young Bros. on all claims against it by the plaintiff, there was no need for the court to address Young Bros.' cross-claim against Vernay Products for indemnification and contribution.

On appeal, the First Circuit ordered the entry of judgment against Young Bros. on the plaintiff's strict liability count. *Sullivan v. Young Bros. & Co.*, 91 F.3d 242, 254 (1st Cir. 1996). Young Bros. then moved in this court for entry of judgment on its cross-claim against Vernay Products, specifically including attorney fees and costs. This motion was denied on November 20, 1996, Docket No. 78 (endorsement), and a second amended judgment was thereupon entered, Docket No. 81. A third amended judgment was entered by the court on January 7, 1997 in response to a joint motion of Young Bros. and Vernay Products that it do so. Docket Nos. 82 and 83. This represents the first entry of judgment in favor of Young Bros. on its cross-claim for indemnification. Nine days later, Young Bros. filed this motion.

Vernay Products first argues, without citation to authority, that this court's initial denial of Young Bros.' request for an award of attorney fees against it is the law of the case and that the denial

may therefore not be revisited. However, at the time of the initial denial, no judgment had been entered for Young Bros. on its cross-claim for indemnification against Vernay Products, and judgment had been entered in favor of Young Bros. on all counts of the plaintiff's complaint. By the time Young Bros. brought the instant motion the situation had changed significantly. It is clear that Young Bros. seeks its attorney fees and costs from Vernay Products as an element of its newly-awarded indemnification by Vernay Products. Young Bros.' motion is timely and appropriate under this court's Local Rule 54.2, which requires an application for attorney fees to be filed within 60 days of entry of judgment, when no notice of appeal has been filed, and within 30 days of disposition of the appeal in all other cases. The doctrine of law of the case is simply inapplicable under these circumstances.¹

Young Bros. bases its claim for attorney fees and costs on Section 914 of the Restatement.

That section, entitled "Expense of Litigation," provides:

- (1) the damages in a tort action do not ordinarily include compensation for attorney fees or other expenses of the litigation.
- (2) One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.

Young Bros. correctly notes that this section of the Restatement has been adopted in Maine. *Gagnon v. Turgeon*, 271 A.2d 634, 635 (Me. 1970). However, the First Circuit did not order the entry of

¹ Vernay Products also argues that an award of attorney fees should be denied under Section 400 of the Restatement (2d) of Torts, the "apparent manufacturer" doctrine. However, that argument is addressed to the question whether indemnification of Young Bros. by Vernay Products is appropriate, an issue that is not before the court on this motion and one which has been resolved against Vernay Products.

judgment against Young Bros. on the strict liability count because of tortious conduct by Vernay Products that caused Young Bros. to be sued by Sullivan, but rather because Young Bros. was also a seller of the defective Vernatube and therefore strictly liable under Maine's applicable statute. *Sullivan*, 91 F.3d at 254. *See also Safeway Stores, Inc. v. Chamberlain Protective Servs., Inc.*, 451 A.2d 66, 69-70 (D. C. App. 1982) (analyzing claim for attorney fees separately under Section 914 and common-law indemnity). Section 914 simply does not apply to the situation present here.

Maine law governs the question presented here. *General Contracting & Trading Co. v. Interpole, Inc.*, 899 F.2d 109, 113 (1st Cir. 1990). However, the Law Court has not addressed the question directly.²

Absent controlling state-law precedent, this court must predict whether the Law Court would award attorney fees to Young Bros. under the specific circumstances present in this case. "Where unsettled questions of law are involved, we can assume that [Maine's] highest court would adopt the view which, consistent with its precedent, seems best supported by the force of logic and the better-reasoned authorities." *Ryan v. Royal Ins. Co. of Am.*, 916 F.2d 731, 739 (1st Cir. 1990). Other jurisdictions differ in their treatment of the question whether attorney fees may be recovered by the party recovering judgment on a common-law indemnification claim. *Compare, e.g., Schneider v. National R. R. Passenger Corp.*, 987 F.2d 132, 138 (2d Cir. 1993) (attorney fees recoverable when

² The only reported case in which the Law Court upheld an award of attorney fees as part of an indemnification, *Northeast Bank of Lewiston & Auburn v. Murphy*, 512 A.2d 344 (Me. 1986), is inapposite. In that case, the Law Court adopted section 97 of the Restatement of Restitution (1937), which deals with indemnification of a negligent defendant by another liable party whose reckless or intentional conduct caused an injury that could have been avoided by the party from whom indemnification is sought, but not by the negligent defendant seeking indemnification. Here, Young Bros.' liability is not based on negligence and the conduct of Vernay Products was not found to be reckless or intentional.

incurred defending claim where the party is entitled to indemnification; Connecticut law),³ with *United States v. Hardy*, 916 F. Supp. 1385, 1391 n.5 (W. D. Ky. 1996) (availability of attorney fees depends on equities of situation; Kentucky law), and *Hartford Accident & Indem. Co. v. H. P. Williams*, 291 F. Supp. 103, 106 (W. D. Va. 1968) (attorney fees “rarely if ever allowed in common law indemnity actions;” citing Minnesota and Oklahoma case law). Even in those states that allow recovery of attorney fees, however, there are some limitations. In several jurisdictions, when the indemnified party defended a direct negligence claim as well as the claim on which it is indemnified, recovery is limited to the fees incurred in connection with the indemnified claim only. *E.g.*, *Hales v. Monroe*, 544 F.2d 331, 332 (8th Cir. 1976) (Missouri law); *Piedmont Equip. Co. v. Eberhard Mfg. Co.*, 665 P.2d 256, 260 (Nev. 1983). Other jurisdictions disallow attorney fees altogether if the party seeking them was also defending against allegations of its own negligence. *E.g.*, *Rauch v. Senecal*, 112 N.W.2d 886, 889 (Iowa 1962). Here, as Vernay Products notes in its opposition to the motion, Young Bros. defended against a direct allegation of its own negligence, and it has made no attempt to distinguish the fees incurred in defending against the strict liability claim, upon which it was granted indemnification, from the other claims raised in the complaint and at trial.

In addition, many jurisdictions allowing recovery of attorney fees on indemnified claims require as a precondition that the defense has been tendered to the indemnifying party and rejected. *E.g.*, *Boudreau v. General Elec. Co.*, 625 P.2d 384, 390 (Haw. App. 1981); *Heritage v. Pioneer*

³ Even those jurisdictions that allow indemnified parties to recover attorney fees do not allow recovery of attorney fees incurred in obtaining the indemnification. *E.g.*, *Safeway Stores*, 451 A.2d at 72 and cases cited therein.

Brokerage & Sales, Inc., 604 P.2d 1059, 1067 (Alaska 1979). This requirement allows defense costs to be minimized at the outset of litigation. Young Bros. does not assert that it requested at any time that Vernay Products provide it with a defense in this action.

If the Law Court were presented directly with this issue, I expect that it would require, consistent with the better-reasoned authorities and as best supported by the force of logic, *Ryan*, 916 F.2d at 739, some limitation on the recovery of attorney fees by indemnified parties, if it would allow such recovery at all. Because Young Bros. defended against claims of negligence and breach of warranty as well as strict liability at trial, and because it did not tender defense of the claims against it in this action to Vernay Products, I conclude that it is not entitled to recover any of its attorney fees. Pursuant to Fed. R. Civ. P. 54(d)(1), Young Bros. may recover the non-attorney fee costs incurred in obtaining the indemnification, to the extent that it can separately identify such costs.

For the foregoing reasons, I recommend that the motion of Young Bros. for recovery of fees and costs be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 24th day of July, 1997.

David M. Cohen
United States Magistrate Judge